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In the Supreme Court
of the United States

OCTOBER TERM, 1956
No. 204

WILLIAM BENZ, et al, Individually and as Representative of All of the Members of the SAILORS' UNION OF THE PACIFIC,

M. D. MACRAE, et al, Individually and as Representatives of All of the Members of Local 90 of the NATIONAL ORGANIZATION OF MASTERS, MATES AND PILOTS, AFL,

JEFF MORRISON, et al, Individually and as Representative of All of the Members of ATLANTIC AND GULF DISTRICT, SEAFARERS' INTERNATIONAL UNION, AFL,

Petitioners,

vs.

COMPANIA NAVIERA HIDALGO, S. A., a corporation,

Respondent.

BRIEF FOR THE PETITIONERS

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

OPINION BELOW

The opinion of the Court of Appeals for the Ninth Circuit is reported at 233 F2d 62.

JURISDICTIONAL STATEMENT

The judgment of the Court of Appeals was entered April 6, 1956 (R. 490). The Petition for Writ of Certiorari was filed June 27, 1956, and was granted November 5, 1956. The jurisdiction of this court rests on 28 USCA 1254 (1), 62 Stat. 928.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The following provisions of the United States Constitution are involved herein:

(1) Article I, Section 8, Clause 3:

> "The Congress shall have Power * * * To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes. * * *"

(2) Article VI, Clause 2:

> "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

The following Statutes are involved herein:

(1) Section 7 of the National Labor Relations Act, as amended by the Labor-Management Relations Act, 1947, 61 Stat. 140, 29 USCA Section 157:

> "Employees shall have the right to self-organiza-

tion, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8 (a) (3)."

(2) Section (8) (b) (4) of the National Labor Relations Act, as amended by the Labor-Management Relations Act, 1947, 61 Stat. 141, 29 USCA Section 158 (b) (4):

"It shall be an unfair labor practice for a labor organization or its agents * * *

(4) to engage in, or to induce or encourage the employees of any employer to engage in, a strike or a concerted refusal in the course of their employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services, where an obect thereof is: (A) forcing or requiring employer or self-employed person to join any labor or employer organization or any employer or other person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person; (B) forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of section 159 of this title; (C) forcing or requiring any employer to recognize or bargain with a particular labor organization as the representative of his employees under the provisions of section 159

of this title; (D) forcing or requiring any employer to assign particular work to employees in a particular labor organization or in a particular trade, craft, or class rather than to employees in another labor organization or in another trade, craft, or class, unless such employer is failing to conform to an order or certification of the Board determining the bargaining representative for employees performing such work: Provided, That nothing contained in this subsection shall be construed to make unlawful a refusal by any person to enter upon the premises of any employer (other than his own employer), if the employees of such employer are engaged in a strike ratified or approved by a representative of such employees whom such employer is required to recognize under this subchapter. * * *"

(3) Section 301 (b) of the National Labor Relations Act, as amended by the Labor-Management Relations Act, 1947, 61 Stat. 156, 29 USCA Section 185 (b):

"Any labor organization which represents employees in an industry affecting commerce as defined in this chapter and any employer whose activities affect commerce as defined in this chapter shall be bound by the acts of its agents. Any such labor organization may sue or be sued as an entity and in behalf of the employees whom it represents in the courts of the United States. Any money judgment against a labor organization in a district court of the United States shall be enforceable only against the organization as an entity and against its assets, and shall not be enforceable against any individual member or his assets."

(4) Section 303 of the National Labor Relations Act, as amended by the Labor-Management Relations Act, 1947, 61 Stat. 158, 29 USCA Section 187:

"(a) It shall be unlawful, for the purposes of this section only, in an industry or activity affecting commerce, for any labor organization to engage in, or to induce or encourage the employees of any employer to engage in, a strike or a concerted refusal in the course of their employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services, where an object thereof is—

(1) forcing or requiring any employer or self employed person to join any labor or employer organization or any employer or other person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person;

(2) forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of section 159 of this title. * * *

(b) Whosoever shall be injured in his business or property by reason of any violation of subsection (a) of this section may sue therefor in any district court of the United States subject to the limitations and provisions of section 185 of this title without respect to the amount in controversy, or in any other court having jurisdiction of the parties and shall recover the damages by him sustained and the costs of the suit."

QUESTIONS PRESENTED

The Court of Appeals for the Ninth Circuit has affirmed judgments of the District Court of Oregon entered in diversity cases awarding damages on account

of peaceful picketing in interstate and foreign commerce in actions based upon complaints praying for injunctions and seeking damages under the laws of the State of Oregon. The questions presented are:

1. Whether the Labor-Management Relations Act, 1947, deprives a state court or federal court in a diversity case of jurisdiction to hear and determine a controversy involving damages for peaceful picketing by a union in interstate commerce when such conduct constitutes either:

(a) An "unfair labor practice" for which a remedy in damages is available under the Act, or

(b) Protected activity under Section 7 of the Act.

2. Whether the remedy for damages provided for in the Labor-Management Relations Act, 1947, constitutes the exclusive remedy for damages on account of peaceful picketing in interstate commerce.

3. Whether the Labor-Management Relations Act, 1947, has preempted the field so as to prevent a federal court, sitting in a diversity case, of jurisdiction to award damages under the state law for peaceful picketing of a ship by an uncertified union to induce employees of neutral independent contractors to refuse in the course of their employment to work on the ship as ordered by their employers, where the object as found by the trial court was to force the independent contractors to cease doing business with the shipowner in repairing and loading the ship for the purpose of requiring the shipowner to re-employ the crew it had previously discharged from jobs which were then open on the ship.

STATEMENT OF THE CASE

The three cases which are consolidated in this petition were brought by a shipowner seeking an injunction and damages, under state law, for the loss of the use of its vessel, caused by peaceful picketing conducted by the petitioners, who are individuals, and as individuals and representatives of a class composed of certain maritime labor unions.

The respondent is a Panamanian corporation and the owner of the SS RIVIERA, a Liberian flag vessel, which was engaged as a tramp steamer carrying cargoes of grain by charter from ports of the United States to ports in the Orient. The petitioners are individuals and officers of three voluntary unincorporated labor unions. The unions represent seamen employed aboard vessels carrying grain between ports of the United States and ports in the Orient. The unions and their members have an economic interest in the wages, hours and working conditions existing aboard vessels engaged in that trade. (R. 20.)

The essential facts involved in this case are best described by the following time table of events:

1952 March	The SS RIVIERA at Bremen, Germany, hired a crew under articles for a period of two years, or until return to a European port. (R. 15.)
Apr. 19	The SS RIVIERA departed from New Orleans, Louisiana, for India, loaded with a cargo of grain on charter under the Aid to India Act. (R. 16, 146.)

July — The SS RIVIERA loaded stores of fresh and frozen foods consisting of low-grade meat, 50% of which was not fit for human consumption. (R. 121, 48, 182.)

Aug. — Members of the crew of the SS RIVIERA made complaints to the Master concerning the food. (R. 49, 136.)

Sept. 3 — The SS RIVIERA arrived at Portland, Oregon, after a voyage from India by way of Japan, made in part by the crew hired in March at Bremen, Germany, and in part by new crew members hired at intervening ports. (R. 16.)

Sept. 9 — About three days before the ship was scheduled to depart, the crew of the SS RIVIERA ceased working on the vessel, went on strike, and were discharged. (R. 17, 125, 148, 241.)

Sept. 15 — The crew members signed cards requesting the Sailors' Union of the Pacific to act as their collective bargaining agent, which proposed agency was not accepted until October 14, 1952. (R. 17.)

Sept. 18 — The respondent brought a possessory libel suit in the District Court in Admiralty to remove the crew that had been discharged from the vessel and the vessel was libeled by the Marshal. (R. 17.)

Sept. 25 — The District Court made and entered its decree in the possessory libel suit ordering the discharged crew members to leave the vessel. (R. 17.)

Sept. 26 — The crew members left the vessel and were held in custody by the Immigration Service. They were ordered deported but the Immigration Service was willing to allow voluntary departure if they were re-employed

aboard the SS RIVIERA. (R. 18, 241). The SS RIVIERA was without a crew hired to work aboard the vessel until December 20, 1952. (R. 21.)

Oct. 3 The SS RIVIERA was libeled by the discharged crew members for collection of their wages. (R. 19, 420.) Although the District Court found the vessel seaworthy, it entered Findings and a Decree awarding the crewmen their wages. (Pretrial Exs. 17, 18, R. 432, 442.)

Oct. 9 The respondent filed a "libel" against the Sailors' Union of the Pacific for damages alleging that the Sailors' Union induced the crew members of the vessel to go on strike. (R. 19, Pretrial Ex. 19, R. 445.) On December 6, 1952, the District Court made and entered Findings and Conclusions and entered a Decree dismissing respondent's libel for damages against the Sailors' Union of the Pacific and specifically held that the Sailors' Union of the Pacific did not induce the crew members to go on strike. (Pretrial Exs. 21, 22, 451, 455.)

Oct. 14 The Sailors' Union of the Pacific, acting pursuant to a resolution adopted by the Union, commenced peaceful picketing of the SS RIVIERA, which picketing continued until enjoined by the District Court on November 26, 1952. (R. 18; Pretrial Ex. 14, R. 415). The employees of independent contractors engaged in stevedoring and ship repair work refused to cross the picket line although requested to do so by their employers. (R. 19.)

Oct. 28 The first of the three cases at bar was filed by the respondent against the petitioners in

the District Court for an injunction and damages. (Pretrial Ex. 86; R. 481.)

Nov. 28 The SS RIVIERA was peacefully picketed by the National Organization of Masters, Mates and Pilots, Local 90, which picketing continued until restrained by the District Court on December 8, 1952. (R. 328.)

Dec. 10 The SS RIVIERA was peacefully picketed by Atlantic and Gulf District, Seafarers' International Union until December 12, 1952, when the picketing was enjoined by the District Court. (R. 350.)

In reviewing the time table of events set out above, it is important to note that the District Court found that the Sailors' Union of the Pacific did not induce the crew to go on strike. Also the picketing for which damages were awarded in these cases did not begin until more than a month after the crew of the vessel had been discharged. (R. 241.) During all of the period of the picketing, and for a period of three weeks prior to the picketing, the SS RIVIERA was without a crew employed on board and there were approximately twenty-five jobs open for seamen on the vessel. (R. 21.)

It was admitted, and the court found, that the picketing "was at all times conducted in a peaceful manner and without any violence." (R. 18.) The employees of independent contractors engaged in stevedoring and ship repair work on the vessel refused to cross the picket line, although they were ordered to do so by their employers. The SS RIVIERA was therefore unable to be repaired and loaded and it lay idle during the picketing.

The cases at bar were brought separately in the District Court by the respondent as common law actions for injunctions and for damages for the loss of the use of its vessel from October 14, 1952, when the Sailors' Union of the Pacific began picketing, until December 12, 1952, when the picketing ceased in obedience to the District Court injunctions. The respondent predicated its cases upon the common law of Oregon on the theory that the picketing was for the "unlawful purpose" of requiring the respondent to rehire its former crew members who went on strike, had been discharged, put off the ship, and who were confined in jail.

The jurisdiction of the District Court was based upon diversity of citizenship and the amount involved. 28 USCA Sec. 1332 (a) (2), 62 Stat. 869.

The District Court allowed temporary injunctions and appeals were taken to the United States Court of Appeals for the Ninth Circuit, but were dismissed on the ground that the injunctions were moot because the vessel had departed. *Benz, et al v. Compania Naviera Hidalgo,* 205 F2d 944, cert. denied 346 U.S. 885. The cases were remanded to the District Court to be tried on the issue of damages as if the injunctions had not been issued. The cases were tried in the District Court without a jury. The District Court made the following Finding of Fact:

> *"Said picketing by members of the Sailors' Union of the Pacific was intended to prevent the repairing and loading of the SS RIVIERA;* and the sole purpose of said picketing by the members of the Sailors'

Union of the Pacific was to compel the plaintiff to re-employ the said discharged, striking members of the crew of the SS RIVIERA for a shorter period than that stated in the articles, and at wage rates and other conditions more favorable to them than those stated in said articles." (Finding of Fact XII, R. 242.) (Emphasis ours.)

Among the Conclusions of Law made by the District Court were the following:

"The Court has jurisdiction of the subject matter. Plaintiff has no administrative remedy under the National Labor Relations Act as amended by the Labor-Management Relations Act of 1947, and the Court is not deprived of jurisdiction by the existence of any such remedy. (Conclusion I, R. 244.)

"Defendants' said picketing was for an unlawful purpose. There was no labor dispute between plaintiff and defendants or the Sailors' Union of the Pacific. * * * (Conclusion III, R. 245.)

The District Court then concluded that "the picketing was the sole proximate cause of the plaintiff's damages" and awarded a judgment for damages against the petitioners. (R. 246.)

In rendering its opinion in these cases the District Court said the following concerning the question of federalism or preemption:

"Defendants' brief raises four principal contentions:

First, that this court is deprived of jurisdiction because the Taft-Hartley Act has pre-empted the field. This same contention was urged at the time

I had under consideration the issuance of the interlocutory injunctions. In my opinion dated November 22, 1952, in Civil No. 6699, I stated:

> 'It seems clear to me that the Taft-Hartley Act is concerned solely with the labor relations of American workers—between American concerns and their employees in the United States, and it is not intended to, nor does it cover a dispute between a foreign ship and its foreign crew. The National Labor Relations Board has construed the Act in the same way. In a petition brought by the Sailors' Union of the Pacific to represent foreign seamen on a ship registered under a foreign flag the National Labor Relations Board dismissed the petition on the ground that the internal economy of a vessel of a foreign registry and ownership was involved. (Companie Maritima Samsoc, Ltd., Sailors' Union of the Pacific, A.F.L.) Case Number 20-C-809 May 1, 1950.'

I have carefully examined the argument of defendants on this issue and particularly the statutory provisions and the decisional law. However, nothing therein contained has altered my opinion that these cases are not governed by the provisions of the Labor-Management Relations Act. (Taft-Hartley Act.) (Pet. for Cert. p. 38.)"

Upon appeal to the United States Court of Appeals, specification of error was made in each case to the District Court's holding that it was not deprived of jurisdiction to grant a remedy in damages under the law of Oregon for peaceful picketing notwithstanding the provisions of the Labor-Management Relations Act, 1947. The Court of Appeals in affirming the judgments, said:

> "That question seems to us decisively settled by the Supreme Court in United Construction Workers v. Laburnum Construction Co., 347 U.S. 656 (1954)."

The Court of Appeals, after quoting from *Laburnum*, concluded as follows:

> "The remedy sought in the cases before us is damages. No such remedy exists under the federal law for this fact situation. This is not a secondary boycott or a case of an award of back-pay to reinstated employees where money damages may be recovered under federal law. See *Laburnum, supra*, at 665. Under the test enunciated in the *Laburnum* case, therefore, the state courts of Oregon, and the federal district court sitting in a diversity case, clearly have jurisdiction of a common law tort action for damages done by unlawful picketing. * * *"

As we shall point out in our argument herein, the District Court was deprived of jurisdiction to determine the controversy and to enter the judgments for damages on account of peaceful picketing in interstate commerce.

SUMMARY OF ARGUMENT

The Labor-Management Relations Act, 1947, has preempted the state's power to give a remedy by means of an action for tort damages on account of the peaceful picketing involved in these cases. The fact situation reasonably brings the controversy either within the provisions of the Act defining "unfair labor practices" for which a remedy in damages is allowed under the Act, or the controversy is within the protection afforded by the Act in Section 7. The conduct of the petitioners in picketing

the respondent's vessel involved no violence; but was a peaceful exercise of economic pressure in a labor dispute in interstate commerce. If the picketing should be determined to be secondary in its nature in that it induced the employees of independent contractors to cease doing business with the respondent, the conduct might fall within the provisions of the Act defining unfair labor practices for which a remedy in damages is available under Section 303 of the Act.

On the other hand, should the picketing be found to be an exercise of rights guaranteed by Section 7 of the Act, the state would be powerless to award damages for such conduct.

In any event the determinations of the controversy should be before the tribunal prescribed in the Act. If the respondent is entitled to any damages its complaint should have been framed under Section 303 of the Act in order that the petitioners could put into issue the question of whether or not the conduct was either protected or prohibited by the Act.

The Act under the circumstances in this case has preempted the field and the State of Oregon is barred from giving a remedy for damages for the peaceful picketing carried on by the petitioners.

The fact that the respondent is a foreign corporation operating a foreign flag vessel should not alter the decision with respect to preemption. The damages sought are for picketing conducted on American soil by Americans. The

fact that the party claiming to be damaged by the picketing is a foreigner is no criterion for a choice between state and federal law. It is on the contrary all the more reason why the choice should be federal law, since it is the purpose of the Act to govern interstate and foreign commerce.

Also the fact that the respondent's employees were seamen should not alter the decision with respect to preemption. The respondent's former crew members had been discharged more than a month prior to the picketing for which damages are sought in these cases. The picketing was not carried on by crew members under articles. It involved no mutiny or desertion, nor other violation of maritime law.

ARGUMENT

I.

A State is Deprived of Jurisdition to Award Damages for Peaceful Picketing in Interstate Commerce by the Preemption of the Field by the Labor-Management Relations Act, 1947.

The principal question raised in these cases is whether the National Labor Relations Act, as amended, has preempted the field so as to bar the State of Oregon from giving a remedy by means of an action in tort for damages on account of the peaceful picketing involved in these cases.

The fundamental concept of constitutional law upon

which the solution of this question rests was succinctly stated as follows in the last term by the Court as follows:

> "By virtue of the Commerce Clause, art. 1, Sec. 8, cl. 3, Congress has power to regulate all labor controversies in or affecting interstate commerce, such as are here involved. If the congressional enactment occupies the field, its control by the Supremacy Clause, art. 6, cl. 2, supersedes or, in the current phrase, pre-empts state power." *United Automobile A & A. I. W. v. Wisconsin Emp. Rel. Bd.*, 351 U.S. 266, 271; 76 S. Ct. 794, 797 (1956).

The Court has many times dealt with the problem of the relationship between state and federal jurisdiction concerning labor relations. In *Weber v. Anheuser-Busch, Inc.*, 348 U.S. 468, 75 S. Ct. 480, 99 L. Ed 546 (1955) this Court summarized its previous decisions on the subject of federalism in labor relations, and classified them under four separate headings, depending upon the conduct involved, and the remedy afforded.

In the first three classifications were grouped the following cases where the conduct involved and the remedy afforded were such that they were exclusively governed by the federal law and its procedure:

1. "A State may not prohibit the exercise of rights which the federal Acts protect."

   (a) *Hill v. State of Florida ex rel Watson*, 325 U.S. 538, 65 S. Ct. 1373, 1375, 89 L. Ed. 1782. (State could not impose prerequisites to "federally established right to collective bargaining.")

   (b) *International Union v. O'Brien*, 339 U.S. 454, 70 S. Ct. 781, 94 L. Ed. 978. (State's strike-

vote provisions contrary to Section 7 of Taft-Hartley Act.)

(c) *Amalgamated Asso. etc. v. Wisconsin Employment Relations Board,* 340 U.S. 383, 71 S. Ct. 359, 95 L. Ed. 364. (State Public Utility law contrary to Section 7 of the Taft-Hartley Act.)

(d) *Garner v. Teamsters Union,* 346 U.S. 485, 499, 74 S. Ct. 161, 170, 98 L. Ed. 228. (Federal restraint in specified types of picketing implies other picketing is protected conduct.)

2. "A State may not enjoin under its own labor statute conduct which has been made an 'unfair labor practice' under the federal statute."

(a) *Garner v. Teamsters Union, supra:* (State cannot enjoin union from federal unfair labor practice where federal Act gives the remedy for an injunction.)

(b) *Plankinton Packing Co. v. Wisconsin E. R. Board,* 338 U.S. 953, 70 S. Ct. 491. (State cannot enjoin employer's commission of federal unfair labor practice where federal Act affords a remedy.)

(c) *Building Trades Council v. Kinard Construction Co.,* 346 U.S. 933, 74 S. Ct. 373, 98 L. Ed. 423. (State cannot afford a remedy which is available under the federal Act.)

(d) *Capital Service, Inc. v. Labor Board,* 347 U.S. 501, 74 S. Ct. 699, 98 L. Ed. 887. (State court cannot enjoin a union's commission of an unfair labor practice where the Board can give a remedy by injunction.)

3. "The Federal Board's machinery for dealing with certification problems also carries implications of exclusiveness."

(a) *La Crosse Telephone Corp. v. Wisconsin E. R. Board,* 336 U.S. 18, 69 S. Ct. 379, 93 L. Ed. 463. (State may not certify union as collective bargaining agent where federal Board procedure is available.)

(b) *Bethlehem Steel Co. v. New York State Labor Relations Board,* 330 U.S. 767, 67 S. Ct. 1026, 91 L. Ed. 1234. (State may not certify even if federal Board has refused certification.)

In the Fourth classification adopted by the Court were grouped the following cases where the state's exercise of jurisdiction was found "not to have been exclusively absorbed by the federal enactments." The conduct involved in this group of cases was said to be "not subject to regulation by the federal Board, either by prohibition or by protection:"

(a) *Allen-Bradley Local v. Wisconsin E. R. Board,* 315 U.S. 740, 62 S. Ct. 820, 86 L. Ed. 1154. (State was allowed to enjoin violent picketing.)

(b) *International Union, etc. v. Wisconsin E. R. Board,* 336 U.S. 245, 69 S. Ct. 516, 93 L. Ed. 651. (Recurrent unannounced work stoppage enjoined by the state.)

(c) *Algoma Plywood & Veneer Co. v. Wisconsin E. R. Board,* 336 U.S. 301, 69 S. Ct. 584, 93 L. Ed. 691. (State allowed to forbid enforcement of maintenance of membership clause.)

(d) *United Construction Workers v. Laburnum Construction Corp.,* 347 U.S. 656, 74 S. Ct. 833, 98 L. Ed. 1025. (An action for damages based on violent picketing and no compensatory relief available under the federal Act.)

The Court did not place the *Weber* case under any of

the foregoing categories, but in effect created a new group of cases to be exclusively governed by the federal law when the conduct comes within the following rule:

> "But where the moving party itself alleges unfair labor practices, where the facts reasonably bring the controversy within the sections prohibiting these practices, and where the conduct, if not prohibited by the federal Act, may be reasonably deemed to come within the protection afforded by that Act, the state court must decline jurisdiction in deference to the tribunal which Congress has selected for determining such issues in the first instance." *Weber, supra,* p. 481.

The *Weber* case made it clear that in determining the line between state and federal jurisdiction, it is not necessary to determine whether the conduct involved consists of an unfair labor practice or whether it is conduct within the protection of Section 7 of the Taft-Hartley Act. The Court said:

> "The point is rather that the Board, and not the State court, is empowered to pass upon such issues in the first instance."

Following shortly after, the Court handed down its *per curiam* opinion in *General Drivers v. American Tobacco Co.*, 348 U.S. 978, 75 S. Ct. 569 (1955) where an injunction issued by the state court of Kentucky enjoining drivers from refusing to cross a picket line set up by another striking union was struck down. The court's opinion was based upon the *Weber* case and the *Amalgamated* case.

The next case to come before the Court was *Local Union No. 25 v. New York, New Haven & Hartford R. R. Co.*, 350 U.S. 155, 76 St. Ct. 227 (1956). There the Teamster's Union picketed the railroad where trailers for "piggy-back" hauling were to be loaded. The court, after holding that the railroad could avail itself of the processes of the National Labor Relations Board notwithstanding its exemption by the provisions of the Railway Labor Act, went on to strike down the permanent injunction granted by the state court. Upon the authority of the *Weber* case it was held that it was for the Board to determine whether or not the conduct was prohibited by Section 8 of the Act, or whether it was protected by Section 7 of the Act. In making this holding the court quoted the portion of the decision in the *Weber* case which we have set out above. It therefore appears that this latter case falls within the new group of cases established by the decision in the *Weber* case.

The next case to come before the Court was *United Mine Workers v. Arkansas Oak Flooring Co.*, 351 U.S. 62, 76 S. Ct. 559 (1956). The union represented a majority of the employees at the respondent's plant. The union's officers had not filed with the Board their non-Communistic affidavits nor certain financial information described in Section 9 of the Act. When the company refused to recognize the union, the employees went on strike and placed a peaceful picket line in front of the employer's plant. The court ruled that the failure to file the organizational and financial data and the non-Communistic affidavits did not excuse the company from recognizing

the union. The court went on to hold that the controversy was governed by the federal Act and that the State court erred in issuing an injunction enjoining the peaceful picketing. The court specifically classified the case with the cases under Group No. 1 as described in the *Weber* case, which are governed by the rule that "A State may not prohibit the exercise of rights which the federal Acts protect."

In *United Auto Workers v. Wisconsin E. R. Board*, 351 U.S. 266, 76 S. Ct. 794 (1956), again the Court was called upon to rule on a case involving the interplay of state and federal jurisdiction in labor relations. In that case the union called a strike at the employer's plant when they were unable to agree upon a new contract. The picketing which was carried on pursuant to the strike involved many kinds of violence. The employer petitioned the Wisconsin Employment Relations Board for an injunction under the Wisconsin law and the injunction was granted and upheld by the Wisconsin courts. The conduct also constituted a union "unfair labor practice" under the provisions of Section 8 (b) (1) of the Act. The court in upholding the injunction issued by the State Board said that the rule in the second group of cases described in the *Weber* case, that a State may not in the furtherance of its public policy enjoin conduct "which has been made an 'unfair labor practice' under the federal statute," was modified by the rule that the states have "power to prevent mass picketing violence and avert threats of violence."

Thus, since summarizing its prior decisions in the

Weber case, this Court has further held that conduct which is protected under the Act is not subject to state control even though the state control is based upon a state regulation outside of the labor field, such as the regulation of trade or carriers. *Weber, supra,* and *General Drivers, supra.* Also if the conduct is protected, a state may not regulate it even if the complaining party is not subject to the Act. *N. Y., N. H. & Hartford R.R. Co., supra.* Also the rule that a state may not regulate conduct which is prohibited by the Act is subject to the rule that a state may take cognizance of a case involving violence. *United Mine Workers, supra.* And finally, in all of the recent cases it is clear that where there is no violence and the conduct may reasonably be determined to be either protected or proscribed conduct under the Act, that a determination of that question must be in accordance with the Act and not by state law or in a state tribunal.

With this background in mind, we come to the facts in this case.

There is practically no dispute in these cases concerning the description or narration of the events surrounding the peaceful picketing by the petitioners of the respondent's vessel. The facts were agreed that a crew was signed on the vessel between March and August of 1952, and that the vessel proceeded to New Orleans, Louisiana, and loaded a cargo of grain which was carried to ports in India and that the vessel then returned to Portland, Oregon, after delivering a cargo of coal to Japan from India. It was also agreed that on September 9, 1952, the

great majority of the crew members of the vessel ceased working and went on strike and were discharged by the Master for their conduct. It was also clear and agreed in the pretrial orders that the Sailors' Union of the Pacific did not commence the picketing for which damages were awarded in these cases until October 14, 1952, and it has been agreed that the picketing "was at all times conducted in a peaceful manner and without any violence."

It was also agreed that "many members of the Sailors' Union of the Pacific are employed aboard American-flag vessels carrying grain between ports including the Port of Portland in the United States and ports in India, and said members and the union have an economic interest in the wages, hours and conditions of employment in said trade." (R. 20.) It was also found by the court that the wages paid by the respondent aboard the SS RIVIERA were only about one-third of the wages paid to seamen represented by the petitioners while employed aboard American-flag vessels engaged in the same trade. (R. 378.)

On the other hand, the parties are much at variance with respect to the purpose or purposes of the picketing. In Plaintiff's complaint, paragraph V, the following is alleged:

> "The alleged purpose of the picketing and the interference with the operation of plaintiff's vessel on the part of defendants and the members of Sailors' Union of the Pacific for which the defendants Benz and Williams are acting is to compel plaintiff to breach its contract with members of the crew of the steamship "Riviera" still aboard said vessel, to com-

pel plaintiff to acquiesce in the desertion and the breach of the vessel's articles by certain members of the crew of the steamship "Riviera," and to compel plaintiff to enter into a new agreement with the Sailors' Union of the Pacific. * * *" (R. 485.)

And in paragraph VI of the plaintiff's complaint the following alleged:

> "As a result of the picketing of the steamship "Riviera" by the defendants, and each of them, the vessel has been idle since September 26, 1952, and the employees of contractors with whom plaintiff had entered into contracts for the repair and preparation of the vessel to carry her cargo of grain to India have refused to perform their duties on board the vessel and plaintiff has been unable to carry out its obligations under the charter party and its right to pursue the vessel's voyage. * * *" (R. 485-486.)

It was the respondent's contention, in the pretrial order (R. 22), and the court found, that the following was the purpose of the picketing:

> "Said picketing by members of the Sailors' Union of the Pacific was intended to prevent the repairing and loading of the SS RIVIERA; and the sole purpose of said picketing by the members of the Sailors' Union of the Pacific was to compel the plaintiff to re-employ the said discharged, striking members of the crew of the SS RIVIERA for a shorter period than that stated in the articles, and at wage rates and other conditions more favorable to them than those stated in said articles." (Finding of Fact XII, R. 242.)

On the other hand the petitioners contend that the picketing had for its purpose the gaining of recognition

by the employer of the unions as the bargaining representatives of the crew to be employed aboard the vessel; (R. 30.) Also the petitioners contend that the picketing had for its purpose the raising of the standards of the working conditions aboard the vessel which was engaged in trade and commerce in which the union members were employed. (R. 30.) The unions also contended that their picketing had for its purpose the publication of their dispute with the employer concerning the hiring of replacements aboard the SS RIVIERA.

It might be argued that were the picketing for the purpose as found by the court, that it would constitute a secondary boycott and an unfair labor practice for which damages may be recovered under Section 303 of the Act. In other words if it is found that the picketing was intended to prevent the repairing and loading of the SS RIVIERA by inducing and encouraging employees of independent contractors to refuse in the course of their employment to perform services on the vessel with the object of forcing the independent contractors to cease doing business with the shipowner in order to require the shipowner to bargain with the unions and rehire the former crew members, then it could be argued that this would have constituted an unfair labor practice for which damages are recoverable under Section 303 of the Act. In this situation, like the cases cited in the second group in the *Weber* case, the remedy established by the Act would be exclusive, and a state court or a federal court in a diversity case would not have jurisdiction to award damages under the state law.

On the other hand if the unions were picketing the vessel to induce the employer to recognize them as the representatives of its employees, or if the unions were picketing the vessel to secure the jobs which were open on the vessel or to promote their own economic interests in the trade and commerce in which the vessel was engaged, then such conduct would be protected under Section 7 of the Act and under the cases cited in the first classification made in the *Weber* case it would follow that a state court or a federal court in a diversity case could not award damages for conduct protected by the federal Act.

The *Weber* case made it clear, however, that it is not necessary to determine whether the conduct is controversy falls within the definition of unfair labor practices under the Act, because the conduct in the instant cases if not prohibited by the federal Act may reasonably be deemed to come within the protection of the Act. In such a situation the issues may be passed upon in the first instance in the manner provided for under the federal Act and not by a state court or a federal court in a diversity case.

There was no mass picketing, violence or overt threats of violence. It was not a case like *United Auto Workers v. Wisconsin E. R. Board*, 351 U.S. 266, (1956) where the state was called upon to exercise its police power. The cases at bar present a situation similar to that found by this court in the *Weber* case, and in *Local Union No. 25 v. N. Y., N. H. & Hartford R.R. Co., supra,* where the court held that "the state must decline jurisdiction in

deference to the tribunal which Congress has selected for determining such issues in the first instance."

The Court of Appeals in affirming the judgments for damages of the District Court in the instant cases said:

> "The remedies sought in the cases before us is damages. No such remedy exists under the federal law in this fact situation. This is not a secondary boycott or a case of an award of back pay to reinstated employees where money damages may be recovered under the federal law. See Laburnum, supra, 665."

The Court of Appeals took it upon itself to determine that the cases did not constitute "a secondary boycott" but made no effort to determine whether or not the cases involved conduct protected by Section 7 of the Act. Furthermore, as has been made clear in the *Weber* case, the determination of the fact situation must be made under the remedies made available under the Act. In other words, since the cases do not involve violent picketing, if the respondent has an action at all for damages, it must be founded under Section 303 of the Act, and filed in a tribunal where the issues of whether the conduct is protected or proscribed under the Act can be determined.

The Congress before passing the Labor-Management Relations Act, 1947, made a complete survey of the field of labor relations and legislated by prohibiting certain types of economic pressures and protecting other types of economic pressures. This Court in *Garner v. Teamsters' Union, supra*, made it clear that where a type of picketing

is not prohibited by the Act, it is then permitted by the Act. The court said:

> "The detailed prescription of a procedure for restraint of specified types of picketing would seem to imply that other picketing is to be free of other methods and sources of restraint. For the policy of the National Labor-Management Relations Act is not to condemn all picketing but only that ascertained by its prescribed processes to fall within its prohibitions. Otherwise, it is implicit in the Act that the public interest is served by freedom of labor to use the weapon of picketing. For a state to impinge on the area of labor combat designed to be free is quite as much an obstruction of federal policy as if the state were to declare picketing free for purposes or by methods which the federal Act prohibits."

We therefore submit that the instant cases fall within the group of cases following the *Weber* case where a state court must decline jurisdiction in deference to the tribunals which Congress has selected for determining such issues in the first instance. The facts reasonably bring the controversy either within the sections of the federal Act prohibiting certain conduct, or, if not prohibited, it may be reasonably deemed to come within the protection afforded by the Act. Indeed, if the peaceful picketing is not prohibited under the federal Act, it is "implicit in the Act that the public interest is served by freedom of labor to use the weapon of picketing." *Garner v. Teamsters' Union, supra.*

Finally, if the conduct is protected under the federal Act, the state cannot award damages against the union exercising its protected federal right. On the other hand,

if the conduct is prohibited, then the respondent has a remedy under Section 303 of the Act, which remedy is exclusive and must be exercised in the manner provided for in the Act. In either event the state law cannot be applied to the controversy in a state court proceeding or by a federal court in a diversity case.

II.

The Preemption by the Federal Act is not Altered by the Fact that the Party Allegedly Damaged was a Foreigner.

As we pointed out earlier in this brief, the District Court in holding that the provisions of the Taft-Hartley Act had not so preempted the field of labor relations as to deprive the court of jurisdiction, said:

> "* * * The Taft-Hartley Act is concerned solely with labor relations of American workers—between American concerns and their employees in the United States, and is not intended to, nor does it cover a dispute between a foreign ship and its foreign crew."

Also the Court of Appeals, although it did not deem it necessary to decide the question, said:

> "It may well be that American laws should not be construed to apply, without some more explicit Congressional indication than we are able to find in the National Labor Relations Act, as amended, to situations with as many points of foreign contact as the situation at bar. Cf. Lauritzen v. Larsen, 345 U.S. 571 (1953)."

In meeting this contention it must again be pointed out that the foreign shipowner was engaged in the carriage of American grain between ports of the United States and the Orient, and that American unions had an economic interest in the working conditions of seamen employed aboard vessels engaged in that trade. (R. 243.)

Also it must be borne in mind that the gist of the cases at bar is damages for picketing conducted by the petitioners ashore in the United States.

The National Labor Relations Board has exercised its jurisdiction with respect to an unfair labor practice charge which was filed with the Board against the Sailors' Union of the Pacific on account of the picketing of a foreign-flag vessel at the Moore Dry Dock Company. The Board determined the question of the primary or secondary nature of the picketing by the union of the foreign vessel at the Moore Dry Docks. *Sailors' Union of the Pacific, AFL, and Moore Dry Dock Co.*, 92 NLRB 547, 27 LRRM 1108 (1950).

Also in *Norris Grain Co. v. Seafarers' International Union*, 232 Minn. 91, 46 NW2d 94, 26 LRRM 2597 (1950) where the Seafarers' International Union, Canadian District, picketed a Canadian vessel at the Norris Grain Company dock in Minnesota, The Minnesota Supreme Court held, after an exhaustive discussion of the authorities, that the Minnesota court lacked jurisdiction because of the preemption of the field by the Labor-Management Relations Act, 1947.

In the *Norris Grain* case the complaint alleged that the Canadian union picketed the vessel moored at the company's dock for the following purpose:

> "So that plaintiff's employees and others who would normally engage in the operation of loading said vessel and operation of said elevator have, because of such picketing and persuasion used by defendants, ceased performing such services for the plaintiff, and defendants by said unlawful acts have caused and will cause loss to plaintiff and its employees. That such unlawful acts are being done to induce or compel plaintiff to refrain from doing business with said Canadian corporation because of said failure of agreement between said Canadian corporation and said defendant Canadian Union."

The Minnesota Supreme Court in holding that the complaint alleged an "unfair labor practice" as defined in 29 USCA 158 (b) (4), said:

> "An examination of the complaint and attached affidavits can hardly lead to any other conclusion than that respondent is engaged in interstate and foreign commerce; that a labor dispute is involved in this controversy; that the object of picketing is to bring pressure to bear on respondent to compel or induce it to cease doing business with the Canadian Company for the purpose of coercing that company into recognizing the Canadian Union as bargaining representative for its employees."

In that case, as in the case at bar, the contention is made that the Act did not apply due to the fact that the shipowner was a foreign employer. In the *Norris Grain Co.* case the respondent's contention was stated as follows:

> "Respondent contends that, inasmuch as the National Labor Relations Board has no jurisdiction over the Canadian Company or the Canadian Union, the federal act does not apply. * * *"

The Minnesota Supreme Court in holding that it was immaterial that the shipowner and the Union were both foreigners, pointed out that "the primary purpose of the Labor-Management Relations Act, 1947 (29 USCA Sec. 141 et seq.), is to prevent interference with the free flow of interstate and foreign commerce and to promote harmony between management and labor in the field of interstate and foreign commerce in order to facilitate the free flow of commerce."

The court in the *Norris Grain Co.* case, in relying upon the National Labor Relations Board's decision in the Matter of *Sailors' Union of the Pacific, AFL, and Moore Dry Dock Co., supra,* in support of its decision, said:

> "The important fact is not what the decision of the Examiner was, but the fact that the National Labor Relations Board did have jurisdiction to decide the controversy. In other words, it was found to come under its jurisdiction by virtue of the National Act. If that is true of the case now before us, then obviously the state court has no jurisdiction."

The court also pointed out that the National Labor Relations Board had held that the foreign employer was an "employer" within the meaning of the federal Act. And in disposing of the respondent's contention with respect to a foreign employer the court concluded as follows:

> "It is obvious that our state courts have no more jurisdiction over the Canadian Company or its employees or the Canadian Union of its relationship to the Canadian Company or its employees than N. L. R. B. *This action is directed* not against the relationship between the Canadian Company and its employees or its relationship with the Canadian Union, *but against acts of defendants done in the United States,* and neither seeks to regulate the relationship between the Canadian Company and its employees or the Canadian Company and the Canadian Union." (Emphasis ours.)

Recently this court in *Local Union No. 25 v. New York, New Haven & Hartford Railway Co., supra* held that the fact that a railroad was expressly excluded from the terms of the National Labor Relations Act did not prevent the railroad from seeking relief through the National Labor Relations Board from picketing by a trucking union which constituted a secondary boycott in violation of Section 8 (b) (4) (A) of the National Labor Relations Act. The court said:

> "The N. L. R. B. is empowered to issue complaints whenever 'it is charged' that any person subject to the Act is engaged in any proscribed unfair labor practice. Sec. 10 (b). Under the Board's Rules and Regulations such a charge may be filed by 'any person.' * * * Furthermore, since railroads are not excluded from the Act's definition of 'person,' they are entitled to Board protection from the kind of unfair labor practice proscribed by Sec. 8 (b) (4) A."

The instant cases involve actions for damages on account of picketing. The picketing was either protected or prohibited by the provisions of the Labor-Management

Relations Act. If the picketing was prohibited by the terms of the Act, a remedy in damages and a procedure for the recovery of damages is provided for under the Act. Title 29 USCA Sec. 187.

Subsection (b) of that section provides in part as follows:

> "Whosoever shall be injured in his business or property by reason of any violation of sub-section (a) of this section may sue therefor * * * and shall recover the damages by him sustained. * * *"

The Labor-Management Relations Act does not limit the remedy for damages to persons subject to the Act, but allows damages to "Whosoever shall be injured. * * *" The alleged damages were due to picketing conducted on American soil by members of American unions. The American unions and their members were clearly subject to the Act. The foreign shipowner could and should have pursued its remedies pursuant to the terms of the Act.

The remedy allowed by the court below in damages against the petitioners was based upon the law of the State of Oregon. The fact that the respondent shipowner was a foreigner can certainly be no ground upon which to base a choice between state law rather than federal law. The foreign aspect of the dispute might invite a choice of foreign law, but could not govern a choice between state and federal law. The picketing which constituted the conduct which was the basis of these actions was carried on upon American soil. It was conduct involved in interstate and foreign commerce. The deter-

mination of whether that conduct was lawful or unlawful should be made under the federal Act. The fact that a foreign corporation was damaged does not alter the situation.

III.

The Preemption by the Labor-Management Relations Act 1947 is not Altered in these Cases by the Fact that the Employees Involved were Seamen.

The responent argued in the courts below and in opposition to our Petition for Writ of Certiorari in this court that the provisions of the Labor-Management Relations Act, 1947, did not apply because the respondent's employees were seamen and "the maritime law controls over general labor legislation." The respondent relied upon *Rees v. U. S.*, 95 F2d 784 (CA-4 1938), and *Southern SS Co. v. NLRB*, 316 U.S. 31, 62 S. Ct. 886, 86 L. Ed. 1246 (1942).

Although the Court of Appeals noted respondent's argument on this point it did not deem it necessary to decide the question, and based its decision upon its interpretation of *United Construction Workers v. Laburnum Construction Corp., supra* (R. 493).

In considering this point it is important to bear in mind that the crew members who had gone on strike had been discharged and were no longer on the vessel. (R.

241.) They had been jailed by the Immigration authorities and were still in custody. (R. 18.) And finally; the picketing which constitutes the basis for the damages awarded in the judgments below did not begin until more than a month after the crew was discharged. (R. 241.)

Rees v. U. S., 95 F2d 784 (CA-4 1938) was not an action for damages on account of picketing. It was a criminal case brought under the mutiny statutes of the United States involving only the criminal liability of the crew members for their refusal to work while under articles. The case raised no question of the tort liability of persons who were not crew members and who picketed the vessel.

In the *Southern Steamship Co.* case, also relied upon by the respondent, this court held that the crew members who went on strike while under articles committed mutiny under the laws of the United States. The court then concluded as follows:

> "Consequently and despite the initial unfair labor practice which caused the strike we hold that the reinstatement provisions of the order exceeded the Board's authority to make such requirements 'as will effectuate the policies of the Act (this Chapter)'."

This court went on, however, to make it clear that notwithstanding this decision, the Union could have, and should have, taken such measures as were available to it in furtherance of its labor dispute with the shipowner, so long as the action taken did not in itself violate the maritime law. The court said:

"It should be stressed that the view we have taken does not prevent the redress of grievances under the Act. At any time following the certification of the N. M. U. in January, 1938, the union and the Board could have secured the assistance of the courts in forcing petitioner to bargain. The importance of seeking such assistance promptly is strikingly illustrated in this case. Had the union and the Board done so, the unfortunate occurrence at Houston might have been averted. *And what is more, nothing that we have said would prevent the union from striking, picketing or resorting to any other means of self-help, so long as the time and place it chooses do not come within the express prohibition of Congress.*" (Emphasis ours.) (316 U.S. at 48, 62 St. Ct. at 895.)

This court was, of course, referring to the right of a union to picket a vessel although the crew of the vessel may be under articles and unable to go on strike without being guilty of mutiny. If such picketing is lawful under the labor law it will not be restrained nor be considered tortious merely because a shipowner or a vessel is involved, so long as the crew members who are under articles do not violate the terms of their articles or commit any act declared unlawful by the maritime law. Such picketing was declared lawful in *Matson Navigation Co. v. Seafarers' International Union*, 100 Fed Supp 730, (1951 DC Md).

The picketing in the instant cases was not in violation of the maritime law, but was conducted by non-crew members on the dock. It was not begun until about three weeks after the crew members had been discharged and had left the vessel. The picketing could not have partici-

pated a violation of the maritime law, because neither the unions nor the persons they represented were at the time of the picketing under articles, nor serving under the jurisdiction of the maritime law.

CONCLUSION

The facts and circumstances in these cases involve peaceful picketing. There was no conduct involved which called for the use by the state of its reserved police powers. The conduct may have been proscribed by the terms of the Act describing "unfair labor practices" for which a remedy of damages is provided in Section 303 of the Act. On the other hand, the conduct may reasonably have been such that it was protected by the provisions of Section 7 of the Act. In either of these circumstances the determination of the controversy should have been made by the tribunal and through the remedy afforded by the Act. The federal court sitting in a diversity case was without jurisdiction to apply state law to this controversy and grant a remedy in damages under the state law.

This court should reverse the judgments of the Court of Appeals for the Ninth Circuit and the judgments of the United States District Court for the District of Oregon, and respondent's actions herein should be dismissed.

Respectfully submitted,

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